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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 696

ELTA KENWARD,

Petitioner,

vs.

THE "ADMIRAL PEOPLES," HER ENGINES, BOILERS, APPAREL, ETC., PORTLAND CALIFORNIA STEAMSHIP COMPANY, CLAIMANT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Supreme Court of the United States:

The petitioner, Elta Kenward, relying upon Title 28, Sec. 347, U. S. C. A. (Sec. 240 of the Judicial Code), to sustain the jurisdiction of this Court, respectfully shows to this Honorable Court as follows:

The respondent is a corporation and is the owner of the steamship "Admiral Peoples."

The petitioner, Mrs. Kenward, was a passenger on the "Admiral Peoples" on a voyage between Wilmington, California, and Portland, Oregon, and that she is an elderly

lady, and that when the vessel arrived at Portland, the officers caused a gang plank leading from one of the decks to the wharf to be placed out, and it stood at a slope from the ship towards the wharf at an angle of 10° to 15°; that the gang plank was two feet in width and eighteen feet in length, and was equipped with a rope railing which terminated approximately three feet from each end of the gang plank. It was further charged that the plank was so constructed that when it was put in place the shore end was about six inches above the level of the dock, which created a step from the gang plank to the dock, and as petitioner proceeded down the gang plank from the ship she was not advised of the step and no warning of any kind being furnished her, she was thrown forward from the gang plank and onto the dock and sustained certain disabling injuries. The particular negligence alleged is unseaworthiness of the gang plank and failure to equip the gang plank with a jumper at the shore end of the gang plank.

We believe that the authorities herein cited upon the question are sufficient to be considered as a brief of the question and for that reason are incorporated herein. However, counsel for petitioner may, within seasonable time, submit further authority by way of a short brief.

The vessel was libeled by a proceeding *in rem* and exceptions to the libel were filed by respondent, who appeared herein claiming ownership of the said steamship. Only one of the several exceptions made was argued in the District Court, namely, that the cause is non-maritime, that is to say, that the allegations of negligence in the libel do not set forth a maritime tort. However, in the brief on appeal to the United States Circuit Court of Appeals, respondents set forth their further exceptions, to wit: that the allegations in the libel are insufficient to constitute a cause of action *in rem* against the defendant vessel and insufficient to entitle libelant to a maritime lien thereon, and also con-

tend that the libel failed to charge the "Admiral Peoples", its owners and operators, with any negligence.

In the opinion of the learned judge of the Circuit Court, the only point considered, however, was the question of the jurisdiction of the admiralty court over the tort upon which the appellant based her action.

This cause might be deemed a "gang plank" case and the decisions of the United States District Court and Circuit Court of Appeals in various jurisdictions have been at variance on the principal point for determination here and it is considered important by counsel for respondent that the said point and questions germane thereto be finally determined by the Supreme Court of the United States.

The exceptions made by respondent herein were sustained by the District Court and a decree entered dismissing the libel. Thereafter petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit and that court affirmed the decree of the District Court, holding that admiralty had no jurisdiction of the place of injury. This was a final determination of the point involved and is the only error relied upon. The date of the opinion of the Circuit Court of Appeals was October 16, 1934, and the mandate has been stayed pending the filing of this petition.

We believe the Court will find from an examination of the authorities pertinent to the principal question herein presented that in the so-called "gang plank" cases the decision will rest upon whether or not the person using the gang plank was proceeding from the ship to the shore or *vice versa*, and we contend it is significant that in all of the cases cited by respondent for consideration by the lower courts, except the *H. S. Pickens*, 42 Fed. 239, the accident happened while the libelant was proceeding from the shore to the ship and not from the ship to the shore and apparently jurisdiction seems to be determined by this test.

In this case the petitioner was descending the gang plank from the ship and she was not entirely free from the gang plank when she tripped and fell. We contend that in the very nature of things, the gang plank is a part of the vessel's appurtenant equipment and it is alleged in the libel it was part of the vessel's equipment and used in the operation of the vessel.

The ruling principle applied in gang plank cases is set forth in the case of *Atna*, 297 Fed. 674, and in the case of *Egan* v. *Morse Dry Dock, etc.*, 212 N. Y. S. 56-58, 1926, A. M. C. 59-61, where reference was also made to the case of *The Strabo* (C. C. A.), 98 Fed. 998.

In the foregoing cases the court applies as a test for admiralty jurisdiction whether the injury occurred getting off or on the ship by a gang plank and came to the conclusion that a rule could be formulated from the many preceding decisions to the effect that if the injury occurs while passing from the ship over a gang plank to the shore, a proceeding can be maintained if the wrong occurs before the libelant has reached the shore; but, if the injury occurs while the libelant is on his way to the ship over a gang plank and has not reached the ship, then there is no jurisdiction in admiralty.

Authorities that may be cited touching upon the whole view of this question are as follows:

The Albion, 123 Fed. 189;
The Atna, 297 Fed. 674;
The Aurora, 178 Fed. 587;
Egan v. *Morse Dry Dock, etc.*, 212 N. Y. S. 56-58;
Fireman's Fund v. *City of Monterey*, 6 F. (2d) 893;
Herman v. *Port Blakely Mills Co.*, 69 Fed. 646;
The Hokkai Maru, 260 Fed. 569;
The Plymouth, 3 Wall. 20;
H. S. Pickens, 42 Fed. 239;

The Strabo, 98 Fed. 998;
Swayne & Hoyt v. *Barsch*, 226 Fed. 581.

It is significant that in the brief submitted to the Circuit Court, the respondent cited and relied upon several of the foregoing cases, which would indicate that the question of whether or not the injured person was traveling from shore to ship or from ship to shore upon a gang plank as being a maritime tort should be finally decided by the United States Supreme Court. We believe that the position of the respondents was principally predicated on the rule announced in *The Plymouth*, 3 Wall. 20, which is one of the early cases fixing the line of demarkation between maritime and non-maritime torts, which rule is outdated by the distinctions later made by our courts.

Reasons Relied On for the Issuance of the Writ.

The question presented is one of admiralty jurisdiction, and therefore important to be settled. The circuit court of appeals and the district courts are in disagreement about it. The decision of the Circuit Court of Appeals for the Ninth Circuit in the present case is contrary to the principles announced in the most recent of the above cited cases and the Court's attention is particularly called to the decision of *The Aurora*, 178 Fed. 587, 588.

We earnestly contend that petitioner herein, a passenger on the "Admiral Peoples" using an instrumentality of the ship, as alleged in the libel, and proceeding to the shore had a clear right to depend upon the seaworthiness of the instrumentality, that is, the gang plank, provided by the ship to proceed safely from ship to shore.

Because of this difference in authorities and the necessity for settling for the whole country this important question of jurisdiction, your petitioner respectfully prays that

this Court will issue its writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify the record in this cause for review and decision by this Court of the question involved.

The foregoing is also submitted as a brief.

And your petitioner will ever pray.

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620 *Spalding Building,*
Portland, Oregon,
Attorneys for Petitioner.

Dated February 7th, 1935.

I, Wm. P. Lord, hereby certify that the foregoing petition is in my opinion well founded in law, and not interposed for delay.

JOHN P. HANNON.
WM. P. LORD.

Service by copy admitted this 7th day of February, 1935.

McCAMANT, THOMPSON & KING,
Of Counsel for Respondents.